

Exhibit 22

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF HAWAII
3

4 WAYNE BERRY, a Hawaii
5 citizen,

CIVIL NO. CV03-00385 SOM LEK
(Copyright)

6 Plaintiff,

7 vs.

8 HAWAIIAN EXPRESS SERVICE,
9 INC., a California
corporation, et al.,
Defendants.

10
11 DEPOSITION OF PHILIP M. JOHNSON, PH.D.
12

13 Taken on behalf of Defendants,
14 at the Law Offices of Kobayashi, Sugita & Goda,
15 Suite 2600, 999 Bishop Street, Honolulu, Hawaii,
16 commencing at 9:12 a.m.,
17 on Thursday, May 19, 2005, pursuant to Notice.
18

19 BEFORE: HEDY COLEMAN, CSR #116, CRR, CM
20 Notary Public, State of Hawaii
Certified Shorthand Reporter
21

22
23 Ali'i Court Reporting
24 2355 Ala Wai Boulevard, Suite 306
Honolulu, Hawaii 96815
25 (808) 926-1719

1 APPEARANCES:

2 For the Plaintiff:

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5 1132 Bishop Street, Suite 1405
6 Honolulu, Hawaii 96813

7 For the Defendant Post-Confirmation Trust:

8 LEX R. SMITH, ESQ.
9 Kobayashi, Sugita & Goda
10 First Hawaiian Center, Suite 2600
11 999 Bishop Street
12 Honolulu, Hawaii 96813

13 and

14 ERIC C. LIEBELER, ESQ.
15 DAMIAN D. CAPOZZOLA, ESQ.
16 Kirkland & Ellis
17 777 South Figueroa Street
18 Los Angeles, California 90017

19 For the Defendants Mark Dillon, Teresa Noa and Brian
20 Christensen, et al:

21 LYLE HOSODA, ESQ.
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For the Defendants Hawaiian Express Service, Inc.,
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1 For the Defendant Guidance Software, Inc. and Michael
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3 REX FUJICHAKU, ESQ.
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6
7 Also present: Wayne Berry
8 Martin Walker, Ph.D.

9
10 Videographer: Robert Whitman, CLVS
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1 A Correct.

2 Q Okay. And how would you describe your area of
3 expertise, sir?

4 A Computer science and software engineering.

5 Q Do you have any other areas of expertise?

6 A What do you mean by "expertise?"

7 Q Well, you've been retained as an expert, right?

8 A Right.

9 Q And you are an expert in areas of your expertise,
10 am I right?

11 A Yes.

12 Q Okay. In that sense of expertise, do you have any
13 other areas in which you're planning on offering expert
14 testimony in this case?

15 A No.

16 Q So the areas you're going to offer opinions are in
17 the areas of computer science and software engineering, and
18 that is all. True?

19 A True.

20 (Whereupon, Exhibit 54 was
21 marked for identification.)

22 BY MR. LIEBELER:

23 Q I'd like to have marked as Exhibit 54, a document
24 entitled "Expert Witness Report, Philip Johnson, Ph. D."
25 What is Exhibit 54, sir?

1 A That is the report that I provided in response to
2 a request by Timothy Hogan and Wayne Berry.

3 Q And when did you actually provide that report?
4 Just because the face of it's not dated.

5 A It was -- when did I send it? Wait. This one was
6 the first one. I believe it was -- I'm thinking December.
7 I'm not exactly quite sure of the exact date. I should have
8 dated it.

9 Q That's fine. And I understand as a general
10 proposition in the deposition, if you can give me an exact
11 answer, that's terrific; if you can't and have to estimate
12 it, that's just fine, too.

13 So, as I understand it, your testimony is
14 something of an estimate, you believe this was
15 provided in December of 2004, is that correct?

16 A No. I think it was -- no, I think it was near the
17 end -- near the -- near the end of this year -- near end of
18 last year, beginning of this year, so December or January of
19 2005 was when I actually submitted this.

20 Q Okay. So it's either the end of 2004, in
21 December, or the beginning of 2005, in January. Is that
22 fair?

23 A Yes.

24 Q Okay. Let's just mark all three of your reports
25 in this case first, before we get to the individuals, each

1 one.

2 Okay. Let's mark as 55, the document that
3 I'm handing to the reporter. oh, good. This one has
4 a date.

5 Can you identify Exhibit 55 for me,
6 please, Prof. Johnson.

7 A This was another report that was requested by Mr.
8 Hogan and Mr. Berry.

9 (Whereupon, Exhibit 55 was
10 marked for identification.)

11 BY MR. LIEBELER:

12 Q And in time, 55 followed 54, is that right?

13 A Correct.

14 (Whereupon, Exhibit 56 was
15 marked for identification.)

16 BY MR. LIEBELER:

17 Q And then let's mark as Exhibit 56, one additional
18 report. And, Professor, identify 56 when you can.

19 A This was a report that actually combines together
20 the Exhibits 55 and 54.

21 Q So, 56 was essentially an unified report that I
22 understand refers to 54, but essentially contains or
23 references, at least all the opinions you have in this case,
24 is that right?

25 A That's correct.

1 may be additions, new papers, and so forth, but, you know,
2 it's -- it's pretty accurate.

3 Q Okay. Have you ever worked in a company actually
4 doing freight logistics?

5 A No.

6 Q Have you ever written any freight logistics
7 software of any kind?

8 A No.

9 Q Do you have any experience at all in the area of
10 freight, or operating any kind of freight logistics
11 software?

12 A Unh-unh.

13 Q That's a no?

14 A That's a no.

15 Q Okay. You -- you told me a little while back that
16 you were provided a copy of the Posner opinion as part of
17 the materials that were sent to you by either Mr. Berry or
18 Mr. Hogan, right?

19 A Yes.

20 Q I take it that you did read that case, did you
21 not?

22 A Yes.

23 Q Did you read any other cases?

24 A Not that I can recall.

25 Q And let me make sure that we're clear. I'm asking

1 that question, not just with respect to to what you did for
2 opinion one, but for opinion two, or in any of the opinions
3 that you have in this case. Is your answer still the same?

4 A Yes, it is.

5 Q And you understand from reading the Posner opinion
6 that Fleming has a right to its own data, is that right?

7 A Correct.

8 Q And you agree with that, am I right?

9 A Yes.

10 Q Let's turn now to Exhibit 55. You have 55 in
11 front of you?

12 A Yes.

13 Q Well, actually, why don't we be efficient about
14 it, actually, and use 56. Fifty-six is probably a better
15 way to go.

16 A Okay.

17 Q But let me check my premises on that. If you read
18 56, it articulates two opinions, am I right?

19 A Yes.

20 Q And those are the only opinions you intend to
21 offer in this case, right?

22 A Correct.

23 Q And opinion number one is what we've walked
24 through on Exhibit 54?

25 A Yes.

1 Q And in your opinion, number one, as articulated on
2 56, it says, "For details, please see my first expert
3 witness report."

4 Do you see that?

5 A Yeah.

6 Q And the first expert witness report you're
7 referring to in 56 is in fact Exhibit 54?

8 A Yes.

9 Q And what you would call the details of the second
10 opinion are contained in Exhibit 56, is that correct?

11 A Yes.

12 Q And essentially, 56 is a compilation of 55 and 54,
13 kind of put together. Is that fair?

14 A Yes.

15 Q So for purposes of examining you, 55 is
16 essentially irrelevant because I can use 56 for all the
17 purposes --

18 A Correct.

19 Q -- which I would otherwise use 55. Am I right?

20 A Yes.

21 Q In that case we're not going to use 55 anymore.
22 Okay.

23 On 56, I think you say that the exhibits
24 you used to form the opinion are Exhibit 7 through
25 18 from Mr. Berry's affidavit, is that right?

1 A Correct.

2 Q Did you use any other documents to form opinion
3 number two in Exhibit 56?

4 A No.

5 Q That was it, am I right?

6 A Correct.

7 Q Let us then mark as exhibit -- are we 58?

8 THE REPORTER: Yes.

9 (Whereupon, Exhibit 58 was
10 marked for identification.)

11 BY MR. LIEBELER:

12 Q So Exhibit 58, a collection of documents that I
13 have put together last night, which are styled Exhibit 7 out
14 through Exhibit 18. Take a look at those sufficient to
15 identify them, Professor, and let me know when you're done.

16 A These are the queries that I mentioned.

17 Q So Exhibit 58 is in fact a collection of exhibits
18 from Mr. Berry's affidavit that you styled as Exhibit 7 to
19 18 in your expert report?

20 A Yes.

21 Q Are Exhibits 7 through 18 written in any
22 particular language?

23 A They look to me to be a form of SQL, which is a
24 language that you use to extract data from databases.

25 Q And you are not an expert in SQL, am I right?

1 extract data into a file. What do you mean by fair in that
2 context?

3 A Yeah, yeah, I see. Okay. Right. So, part of why
4 I'm pausing is there's kind of an evolution in my thinking
5 over time, so this is where I sat at this -- at this
6 juncture.

7 I guess -- I'm sorry, please repeat your question.

8 Q Sure. Let me back up one step to make sure the
9 record is clear. When you wrote here "It is fair to extract
10 the data into a file," by "fair" you meant that would not be
11 a copyright violation, right?

12 A That's what I was thinking the Posner case was
13 saying, yes.

14 Q So you were shorthanding fair as something that it
15 would be permissible for Fleming to do --

16 A Correct.

17 Q -- in the context of this case, right?

18 A No. I guess I was saying that in the context of
19 the Posner case and the situation that they were talking
20 about.

21 Q Got you. Understood. Would it also be fair to
22 extract the data into a spreadsheet?

23 A Yeah. That's -- that's a little different because
24 a spreadsheet has internal structure that a file doesn't.
25 So, generally, when you extract data into a spreadsheet,

1 you're preserving some sort of structure.

2 Q Your e-mail address, I take it, is Johnson@Hawaii.
3 edu?

4 A Correct.

5 Q And so in this packet, if I see an e-mail from
6 Johnson@Hawaii.edu, that's you, right?

7 A That's me.

8 Q Let's mark as Exhibit 60, a copy of "Assessment
9 Technologies of Wisconsin, LLC, versus Wiredata. And I've
10 got a slip opinion copy of it, I guess.

11 Just take a look at that sufficient to
12 identify it, Professor, and let me know when you're
13 done.

14 A I think this is the Posner case.

15 Q You've correctly anticipated my question. Is that
16 the Posner case that you've referred to a number of times in
17 your testimony today?

18 A I believe so.

19 Q Would you agree with me, sir, that Mr. Berry knows
20 more about the structure of his database than you do?

21 A Yes.

22 Q That's an easy one, right?

23 A That's an easy one.

24 Q During your work on this case, did you ever
25 actually boot up a copy of Mr. Berry's 1993 FCS and use it?

1 A No.

2 Q Same question for the spreadsheets.

3 A No, I did not.

4 MR. LIEBELER: Okay. I don't have any further
5 questions for you.

6 THE VIDEOGRAPHER: Off the record?

7 MR. LIEBELER: No.

8 MR. SMITH: I'll just pick up.

9 MR. LIEBELER: You need a mic.

10 THE VIDEOGRAPHER: Can you sit where the mic is.

11 MR. SMITH: All right.

12 EXAMINATION

13 BY MR. SMITH:

14 Q Professor, you gave some opinions in 2002 and 2003
15 regarding the database that Mr. Berry authored, right?

16 A Correct.

17 Q And you did some comparisons in connection with
18 that -- with that work?

19 A In the previous case?

20 Q Right?

21 A Yes.

22 Q And you weren't able to compare source code, is
23 that correct?

24 A Oh, goodness. I can't remember.

25 Q Okay. Well, the database was written in Microsoft

1 Access, right?

2 A Right. I thought I did do some kind of source
3 level comparison. I can't -- I'm sorry, I can't remember
4 about that.

5 Q Okay. You did a structural analysis, correct?

6 A That's correct.

7 A Yeah.

8 Q And that involved a comparison of graphical
9 objects rather than textural lines of code?

10 MR. HOGAN: Is that a question, counsel?

11 MR. SMITH: That is a question.

12 A I can't -- I'm really sorry, I can't remember
13 about that prior case exactly how I did it.

14 BY MR. SMITH:

15 Q Okay, fair enough. So, as you sit here today, you
16 don't remember what you saw in that database from 2002?

17 A You're asking me if I didn't see any of the source
18 code, and my recollection is I was looking at the source
19 code at least for part of it when I did that structural
20 comparison.

21 Q When you did --

22 A I'm sure I looked at source code. I'm sure I did.

23 Q Does Access have source code?

24 A Well, yeah. Oh, that's the difference, right.

25 Some -- some languages are -- like C-plus-plus have source

C E R T I F I C A T E

I, HEDY COLEMAN, CSR, in and for
the State of Hawaii, do hereby certify:

That I was acting as shorthand
reporter in the foregoing matter on the 19th day of
May, 2005;

That the proceedings were taken
down in machine shorthand by me and were thereafter
reduced to typewriting by me; that the foregoing
represents, to the best of my ability, a correct
transcript of the proceedings had in the foregoing
matter;

I further certify that I am not
counsel for any of the parties hereto, nor in any
way interested in the outcome of the cause named in
the caption.

DATED: May 20, 2005

Hedy Coleman

HEDY COLEMAN, CSR #116
Notary Public, State of Hawaii
My commission expires: 9-14-05